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No. 82-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN PAPER INSTITUTE, INC.,
Petitioner,

v.

AMERICAN ELECTRIC POWER SERVICE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., COLORADO-UTE ELECTRIC ASSOCIATION, INC., FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT ELIZABETHTOWN GAS COMPANY IN SUPPORT OF PETITION

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1630
Attorney for
Elizabethtown Gas Company

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Elizabethtown Gas Company (Elizabethtown), intervenor in the court below and, therefore, a party herein (Rule 19.6), urges this Court to grant the petition for writ of certiorari.

STATEMENT

Elizabethtown is a public utility organized and existing under the laws of the State of New Jersey.[1] Under regulation by the New Jersey Board of Public Utilities, Elizabethtown engages in the sale and distribution of gas in 68 municipalities serving over 190,000 customers. Elizabethtown competes in its service area with electric utilities supplying the energy needs of residential, commercial and industrial end users.

Elizabethtown is an actual supplier of gas to cogeneration facilities and a potential supplier of gas to cogeneration facilities which could qualify for the benefits of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117.[2]

The petition for writ of certiorari challenges the decision of the court below insofar as it vacated two of the rules set out in Commission Order No. 69 which im-

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[1] Elizabethtown is a subsidiary of National Utilities and Industries Corporation and has as affiliates Achter Kol Corporation, National Computer Utility Company, Computer Utility Company, NUI Corporation, Enercorp Resources Inc., Enercorp, Nexco Inc., Utility Propane Company, National Gas Gathering Company, National Energy Leasing Company, National Enerdrill Corporation, and The Lenape Resources Corporation.

[2] The relevant provisions of PURPA are reproduced on appendix pages A-7 to A-16 to the petition for writ of certiorari. Section 201 of PURPA required the Federal Energy Regulatory Commission to establish criteria under which cogeneration and small power production facilities could qualify for PURPA benefits. The Commission's Order No. 70, as amended, setting forth those criteria is not the subject of the petition for writ of certiorari. The text of Order No. 70 is reproduced on appendix pages B-120 to B-174 to the petition.

plemented Section 210 of PURPA,[3] namely the "full avoided cost" standard for the sale of surplus power from qualifying facilities to electric utilities, and the interconnection rule requiring electric utilities to interconnect with qualifying facilities.

Elizabethtown accepts, for purposes of this pleading, Petitioner's statement of questions presented, list of parties to the proceeding below, statement of opinions below, statement of jurisdiction, list of statutory and regulatory provisions involved, and statement of the case.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

1. Elizabethtown hereby supports and supplements Petitioner's reasons for granting the writ.

2. The installation of fuel-efficient cogeneration facilities has been stultified because of the lack of assured interconnections with electric utilities which might serve as a market for surplus electric power, and a pricing mechanism for surplus power which would facilitiate the economic planning of new cogeneration facilities.[4]

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[3] Section 210 directed the Commission to prescribe rules which it deemed necessary to establish relationships between qualifying facilities and electric utilities "to encourage cogeneration and small power production." 16 U.S.C. § 824a-3(a). Order No. 69, as amended, is reproduced on appendix pages B-104 to B-119; B-167 to B-174 to the petition.

[4] Opportunities to develop these sources of electric power outside the electric utility industry existed, but were found to be inhibited by the lack of access to interconnections with electric utilities caused by

> uncertainty as to the extent to which the energy cost savings could be offset by higher rates for supplemental or back-up power,

Natural gas is used as a fuel in cogeneration facilities. Where air pollution is a problem, natural gas is a preferred fuel. Gas distribution companies indicated during the rulemaking process that they sought to be a competitive source of energy to fuel PURPA-induced cogeneration.[5]

It is more efficient to use natural gas as a fuel in a cogeneration unit than to use natural gas as a fuel in a typical public utility electric power generation plant. This is because the steam utilized in the latter plant is condensed after passing through the electricity-generating turbines instead of being put to some other industrial or commercial use. In this regard, the Commission found: "Cogeneration facilities use significantly less fuel to produce electricity and steam (or other forms of energy) than would be needed to produce the two separately."[6]

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uncertainty as to their ability to sell surplus power to the utility at a price which reflects its market value, and

reluctance to invest in generation facilities (however economic they may be) if this would bring them under public utility regulation.

See pages B-29 and B-121 of appendix to petition.

[5] About 25 percent of the PURPA-induced cogeneration in the industrial sector is expected to be installed in the Middle Atlantic area which includes New Jersey. The chemical industry anticipates using natural gas in gas-fired combustion turbines and, with process-derived fuels, in steam-topping cycle engines. Pulp and paper plants would use gas and oil as a fuel for cogeneration to augment wood and other process by-products.

PURPA-induced commercial cogeneration is expected to occur almost exclusively in the Middle Atlantic area and to take the form primarily of diesel engines and dual-fuel use engines. Natural gas would be used in dual-fuel use engines when available and less expensive than diesel fuel.

[6] See appendix page B-39 to petition.

3. The cogeneration rules were intended to provide competitive cogeneration sources for bulk electric power. The Commission found: "By obtaining electric energy from cogeneration and small power production, utilities can reduce the burning of fuel and construction of plants than would otherwise be required." (R. 1217)[7]

Consolidated Edison Company of New York, Inc., petitioner in the court below, serves with electricity a territory The Brooklyn Union Gas Company serves with gas. Brooklyn Union advised the Commission in the rulemaking proceeding:

> "Among those parties most vociferously opposing the use of natural gas for 'inferior' cogeneration purposes are electric utilities which are actively engaged in dissipating this nation's 'gas bubble' by using gas as boiler fuel in the generation of electricity. In light of the efficiency standards which the Commission has proposed for gas-fired CFs [cogeneration facilities] which seek qualifying facility status, Brooklyn Union submits that the twin goals of conserving natural resources and maximizing fuel use efficiency could be better achieved by use of natural gas in CFs which meet the Commission's efficiency standards and the termination, at the earliest possible date, of programs which encourage or permit consumption of vast quantities of natural gas in comparatively inefficient utility central electric generating stations." (R. 1418)[8]

The electric utilities successfully persuaded the court below that the statutes which regulate their activities should be so interpreted that they would be preserved

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[7] Record reference is to the record in the court below.

[8] Record reference is to the record in the court below.

from the competition from cogeneration facilities which the Commission's rules would encourage. Apart from the fact that the lower court's construction of PURPA is erroneous, for reasons set out in the petition for writ of certiorari, it needlessly suppresses opportunities for competition in the bulk electric power industry where competition can and ought to exist.[9]

4. "Section 210 of PURPA's Title II . . . seeks to encourage the development of cogeneration and small power production facilities." *Federal Energy Regulatory Commission* v. *Mississippi*, ___ U.S. ___ (1982), 50 U.S.L.W. 4566, 4568 (June 1, 1982). Faced with the obligation to adopt rules encouraging the development of cogeneration, the Commission chose means which would accomplish that result. The lower court did not conclude otherwise.

One may well argue that there are better ways to accomplish that legislative end, ones that are more "fine-tuned" in terms of either economics or the concerns of the electric utilities. But "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

The Commission's rules were within the granted power, issued pursuant to the proper procedure, and have a reasoned basis. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285

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[9] See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Gainesville Utilities Department* v. *Florida Power and Light Co.*, 573 F.2d 292 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978).

(1974). The contrary decision of the lower court needs to be overturned as requested by Petitioner.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1630
Attorney for
Elizabethtown Gas Company

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